United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76 1436

To Be Argued by:
Jay Topkis

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

JERRY WINSTON, BROOME COUNTY AVIATION, INC., COMMUTER AIRLINES, INC., and THEODORE (TED) BELL,

Defendants-Appellants.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF THE DEFENDANTS-APPELLANTS

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA, :

Plaintiff-Appellee, :

-against- : Docket No. 76-1456

JERRY WINSTON, BROOME COUNTY AVIATION, INC., COMMUTER AIRLINES, INC., and THEODORE (TED) BELL, :

Defendants-Appellants. :

- -x

PRELIMINARY STATEMENT

The most significant thing about the Government's lengthy brief is what it does not discuss. For example, the Government does not dispute the business setbacks which forced the Company to fire employees across the board -- ground crew as well as air crew. The Government does not deny the deficient performance of each discharged pilot. And, the Government says almost nothing about the language, framework, history, or purposes of the Railway Labor Act -- odd behavior, we submit, when dusting off a statute unused for a half-century.

Instead, the Government puts almost its entire reliance on two arguments which would seem to lack attraction

in a trailblazing prosecution: the errors below were harmless, says the Government, and, besides, defendants waived them by failing to object.

We of course disagree. Critical errors were made below, and defendants did not waive them. By way of example:

-- Defendants did not withdraw their written request to charge that a defendant must have "actual knowledge of his obligation" (76e). The Government seeks to find wa in a statement in colloquy by trial counsel for defendant Bell (Gov. Br. 35-36). But whatever the significance of this remark as to Bell, the other three defendants are not chargeable with it. And after this alleged waiver, all defendants resubmitted to the trial judge their written requests to charge, including the one on specific intent.*

-- While it is true that defendants took no formal exceptions to the trial court's charge, the record reveals that defendants made clear their conception of proper instructions, and gave the court clear notice of their desire to preserve issues for review: Thus, before the trial began, defendants submitted written requests to charge (76e-82e). The trial

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* The trial court had asked defense counsel to resubmit their requests to charge in a different format (72-73). Had the statement by counsel for Bell (62) constituted a withdrawal of the request to charge on specific intent, as the Government argues, the resubmitted requests would not have included that request.

judge studied the requests and embodied rulings on them in marginal notes (76e-82e). After the court delivered its charge to the jury, defense counsel, in lieu of taking exception, asked the court to mark their written requests as a trial exhibit (2157). So there could have been no intentional waiver: For what purpose other than giving fair notice and preserving issues for appellate review were these actions taken?

-- The Government claims that defendants offered the court a proposed instruction that suspicion of union activity is sufficient, and so may not be heard to complain that the court accepted the offer (Gov. Br. 50-51). But the Government ignores the fact that defendants requested, in an alternative and obviously favored written request, an instruction that a defendant must know of union activity (80e).

But the Government's waiver arguments should be rejected on more basic grounds. This, after all, was the first criminal trial under this statute. Any deficiency in the advocacy below on either side was neither intentional nor the fault of counsel. Rather, as the trial judge recognized, the problem was that counsel -- and the court -- were "working in a totally uncharted field" (73).

It ill becomes the Government to indict a citizen upon an unprecedented charge, to obtain an unprecedented conviction, and then on appeal to argue that the citizen waived objection to error below because his counsel should

have known the proper interpretation of the law (even though the trial court and the Government did not). In such circumstances, and also because the errors below were substantial, the Government's heavy reliance upon waiver should not be countenanced. Screws v. United States, 325 U.S. 91, 107 (1945). Cf., United States v. Hart, 407 F.2d 1087, 1089 (2d Cir.), cert. denied, 395 U.S. 916 (1969).

I

THE EVIDENCE WAS INSUFFICIENT TO FIND THAT ANY OF THE DISCHARGES WERE CRIMINAL EVEN UNDER THE TRIAL COURT'S BROAD DEFINITION OF THE SUBSTANTIVE OFFENSE

The Congress intended that no employer be convicted of violating the Railway Labor Act unless there was "a most convincing presentation of evidence." Hearings Before the Senate Committee on Interstate Commerce, 73rd Cong., 2d Sess., page 152. This "liberal intent[ion]," Id., no doubt was caused by concern -- concern which was later echoed by Courts of Appeals in civil enforcement proceedings -- that the legitimate and basic rights of employers would be chilled if conviction were readily obtainable.

Comes now the Government, in the first trial under the criminal provision of the Act, and offers proof which would not sustain a civil unfair labor practice charge. Thus:

The Government does not dispute any of the economic facts which left the Company overstaffed in October, 1974 and

necessitated a Company-wide reduction of personnel: Winston's spring 1974 plans to expand operations; his hiring of 12 additional pilots between March 1 and August 15; the Company's failure to obtain substantial new business which Winston had relied on in shaping his expansion plans; the Company's loss of significant old business; the deterioration of the business climate; the increase in various costs; and the necessity to decide by September 20 whether to expand or not (1399-1415, 1917-18, 40e).*

Nor does the Government dispute that, in response to these economic facts, the Company reduced not only its pilot staff, but its line staff (from 9 to 5) and mechanics (from 16 to 12) as well (1454-55, 1328-29).

The Government also does not dispute that defendants had good reason to choose the pilots here at issue as least deserving of being retained on the reduced staff:

> (1) Josephson, who admitted, inter alia, that he was warned in August that his performance was unsatisfactory (180);
>
> (2) Slough, a probationary pilot who admitted, inter alia, that he complained to passengers about having to do regularly assigned duties (115-16, 176);
>
> (3) Sholl, who was discharged for negligence confirmed by a Federal Aviation Agency investigation (360, 1120, 1769-73);
>
> (4) Lamca, who was discharged for refusing to comply with a reasonable order (397-98, 401, 432-34);

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* To be sure, the Government snipes at these realities. It argues (Gov. Br. 28) that in Fall-Winter 1974-75 the Company cancelled no flights and combined only some. But that has nothing to do with being overstaffed due to a decision to abandon expansion plans.

(5) Williams, who could not obtain his A.T.R. and thereafter became disinterested in flying (549-53, 578-81, 605);

(6) Larimore, who called Winston a little son of a bitch (641, 658-60, 1252);

(7) Hummel, who had the least flying experience (722-23).

The Government contends of course that these undisputed facts were mere pretexts for the discharges. But the Government offers not fact but surmise. Consider:

The Pre-Election Discharges

1. Only speculation supports the inference, critical to the Government's case, that Harrington reported to defendants that Slough and Josephson participated in the October 2 meeting. The Government seeks to rely on Harrington's testimony that "in some instances" he reported "general things" to Bell (1288-89). But the Government ignores Harrington's testimony that (a) he never reported on what individual pilots said or did at any union meetings (1288), and (b) he did not report the October 2 meeting to defendants (1282).

2. The Government points to a lack of evidence: the files of the discharged pilots contain few notes memorializing the misconduct for which they were discharged. But this non-evidence proves nothing. This small family business kept no regular personnel records -- its executives could and

did rely on memory (1482-83, 1829, 1891). Furthermore, there was no occasion in some instances to make notes: Sholl and Lamos were discharged immediately after their misconduct; and Winston surely required no memorandum to help him recall that Larimore called him a little son of a bitch. The other four pilots were discharged because they were relatively least worthy of continuing with the Company -- it is not surprising that their files contain no indication of serious misconduct.

3. Contrary to the Government's suggestion (Gov. Br. 29-30), the proof showed that co-pilots Slough and Josephson (pre-election discharge) and co-pilots Sholl, Williams, Larimore and Hummel (post-election discharge) were not replaced by newly-hired co-pilots. To be sure, the Company hired three captains in early 1975. But these were replacements for Captains Lamos, Excell and Floto, and were required to keep the captain staff at a minimally acceptable level (1416, 1816, 1842).* For the convenience of the Court, we append to this reply brief a chart which summarizes pilot turnover during the relevant period.

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* The Government also relies on the fact that the captains who were hired to replace Excell, Floto and Lamos performed as co-pilots for their first few months on the job. This was in accordance with normal Company procedure, designed to accustom the new captains to the equipment and routes before they took command of a plane (1024-26).

The Post-Election Discharges

The nub of the Government's argument as to these discharges is that "Winston had a fair idea that [these] five pilots were among the 16 voting against him" and that defendants discharged them in retaliation for their vote. The Government grounds this argument on the pilots' own testimony as to their conversations with Winston (Gov. Br. 16-17).

As to Sholl, at least, this argument is nonsense. He says he told Winston that he had voted against the union (359).

But there is a more fundamental flaw in the Government's argument: By the time the ballots were counted on November 25, 1974, and the Board publicly certified that only four pilots had voted against the union (17e-18e), Winston knew that many pilots had deceived him by handing over their original ballots and expressing their "loyalty," but then voting duplicate ballots in favor of the union. To say that Winston had a "fair idea" that Sholl, Lamos, Williams, Larimore and Humel voted for the union is to say nothing that could not be said about any of the other pilots: 80% of them voted for the union, and by November 25 Winston knew that all pre-election expressions of loyalty were not trustworthy. Consequently, the Government's position is precisely that stated by the prosecutor in his summation (1974): That the discharge of any

employee after organizational efforts have begun would constitute a crime.

The circumstances at bar are similar to those in N.L.R.B. v. Materials Transportation Company, 412 F.2d 1074 (5th Cir. 1969). That firm's business began to decline due to factors beyond its control, and shortly thereafter its drivers began an organizational campaign. The firm decided to reduce its staff by discharging the employees who had the worst records. The Board contended that drivers were laid off on the basis of their union activity. In holding that there was insufficient evidence upon which to ground civil liability, the Fifth Circuit wrote, 412 F.2d at 1078-79 (emphasis added):

> "A majority of the Company's employees were known by management to be attending the union meetings. Over eighty percent of the Company's employees were union adherents. Where such a great percentage of employees attend union meetings and are union adherents, Company knowledge of the identity of the union adherents loses much of its significance without a showing that the employees not in favor of the union were more logical candidates for layoffs, N.L.R.B. v. River Togs, Inc., 2 Cir. 1967, 382 F.2d 198, a showing that was not made here."

Nor was there any such showing in the case at bar as to the post-election discharges. The Government's few arguments are unpersuasive:

1. The Government suggests that Sholl was fired for union activity, not for breaking an aircraft door. Other pilots, the Government says, had accidents and were not fired (Gov. Br. 22). But Sholl's accident was caused by Sholl's negligence. A Company investigation so found (1769-73), and the Federal Aviation Agency's investigation agreed (1120). There was no evidence that any other accident in the Company's history had been caused by a pilot's negligence.

2. The Government argues that Lamos was "justified in refusing to test-fly the airplane . . . where there was an alternate airplane available" (Gov. Br. 24). But the evidence shows that Lamos had been ordered (in accordance with Company policy) to change to a small aircraft to fly the one remaining passenger on the short, last leg from Binghamton to Elmira (423-26). There was no proof that a small plane other than the one Lamos refused to test-fly was available, or that anyone but Lamos was available to conduct the thirty-minute test flight (423, 429-33).* We know only that Lamos admitted that he refused to obey the order (and protested so vehemently that he called Mrs. Winston a liar) "because it would delay me

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* The Government suggests that the test flight had to be completed within 15 minutes and that Lamos was supposed to have that amount of time for a "rest stop" (Gov. Br. 23). There was no such evidence.

by thirty-five to forty minutes" (397) -- not because the order was in any sense unjustified.

3. The Government relies on a note in Williams' file thanking him for improving his attitude toward work (42e). Williams admitted that he had a history of poor performance and had been temporarily discharged in 1968 because of his bad attitude, which included talking abusively to passengers (561-64). The fact that Williams had improved his attitude is not evidence that, in January 1975, he deserved to stay while other pilots were let go.

* * *

In Martel Mills Corporation v. N.L.R.B., 114 F.2d 624, 633 (4th Cir. 1940), the Court refused to enforce the Board's order concerning the discharge of several employees in circumstances somewhat akin to those at bar. It wrote:

> "Where economic considerations necessitate a contraction in the employer's labor force, the employer, in deciding which employees are to be retained, must be free to choose from the more capable and the more worthy. It would be an abuse of the terminology of the [National Labor Relations] Act if an employer were obliged to discriminate in favor of union men as against non-union men through fear of action by the Board and the courts."

In asking this Court to reverse the jury's verdict, we seek only to hold the Government to the minimum standards of proof set forth in the trial court's instruction to the jury. Because important rights are at stake, and in light of the Congress' express liberal intention, those minimum standards should be strictly policed.

When evaluated fairly, in light of these standards derived from the civil case law, the Government's proofs were insufficient to convict.

II

THE TRIAL COURT MISINSTRUCTED THE JURY CONCERNING MATERIAL ELEMENTS OF EACH OF THE CRIMES CHARGED

A. Specific Intent

The Government contends that the erroneous instruction concerning intent was harmless "since it is inconceivable that the jury could have found that the defendants were ignorant of the Act" (Gov. Br. 39). The Government is wrong, both on the law and on the facts.

As a matter of law, it is never harmless error to take from the jury in a criminal trial the issue of a defendant's intent. That subtle issue is not capable of direct proof, and it would be the grossest violation of the constitutional right to a trial by jury for a court to hold that the Government had satisfied its burden on that issue without it having been submitted to a jury. Cf., United States v. Howard, 506 F.2d 1131 (2d Cir. 1974); United States v. Clark, 475 F.2d 240, 248-50 (2d Cir. 1973).

Furthermore, the evidence of specific intent, which the Government says was "overwhelming" (Gov. Br. 40), was in fact nonexistent. The Government points (Gov. Br. 40) to Winston's statements to Kleitz and Briggs about the legality of their voluntarily giving him their ballots -- this proves nothing about his knowledge of the obligations here at issue.

The Government tries to rely on the fact that defendants offered no evidence that they were unaware of their legal obligations. This argument, we suggest, rather misplaces the burden of proof. Besides, the trial court had ruled on the first day of trial that such evidence was inadmissible because, in its view, specific intent was not an element of the crime (61-62).

On the merits, the Government essentially mischaracterizes our position. The question is not whether defendants may invoke "the defense of ignorance of the law" (Gov. Br. 43, emphasis added) -- that question arises only where a statute does not require specific intent. We contend that the Congress intended that willfulness, as defined in such contemporaneous decisions as United States v. Murdock, 290 U.S. 389 (1933), be an element of a criminal violation of the Railway Labor Act. And we demonstrated in our main brief, by means of persuasive legislative history and other authority, why that is so.

The Government responds to that demonstration with inapt case law:

-- United States v. International Minerals and Chemicals Corporation, 402 U.S. 558 (1971), construed a statute which makes a "knowing violation" of certain transportation safety regulations a crime. The Supreme Court relied principally

upon an absence of evidence in the legislative history of an intention to make "willfulness" an element of that offense. 402 U.S. at 562-63.

-- United States v. Illinois Central Ry. Co., 303 U.S. 239 (1938), was decided years after the enactment of the amendments to the Railway Labor Act and dealt with a civil penalty under the Cruelty to Animals Act.

-- Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186, was enacted in 1947 and is in no sense "closely analogous" (Gov. Br. 47) to the delicate issues at bar -- it deals with payments to union officers. The Government quotes from United States v. Ricciardi, 357 F.2d 91, 99 (2d Cir.), cert. denied, 384 U.S. 942 (1966):

> "If the Government had to prove evil motive . . . [under Section 302], its burden would become very much heavier."

As we have shown, the Congress for good reason sought in the Railway Labor Act to cast upon the Government precisely that "heavier burden." What the Congress intended concerning other statutes, regulating conduct of a very different type, is not germane.

B. The Other Elements of a Criminal Employee Discharge

Apart from incantations of waiver and harmless error, the Government has little to say concerning our arguments that (a) a defendant may not be convicted of discharging

an employee unless the defendant actually knew that the discharged employee was engaged in union activity, and anti-union animus was at least the principal reason for the discharge; and (b) it was reversible error to incorporate the "small plant doctrine" into the instruction to the jury.

As to (a), the Government relies on a narcotics case and on civil labor relations decisions. Those authorities are of no value in construing the meaning of the criminal provision of the Railway Labor Act.

As to (b), the Government is silent. We welcome the concession.

III

THE FIRST AMENDMENT REQUIRES THAT THE CONSPIRACY CONVICTIONS BE REVERSED

The Government is strangely silent as to our arguments:

> -- that the indictment and the instructions to the jury were so worded that they permitted the jury to convict defendants if the jury believed that defendants agreed to do nothing more than speak to the pilots to persuade them to vote against the union;
>
> -- that because of that charge and that instruction, these conspiracy convictions must be closely scrutinized on appeal;
>
> -- that the line between threat and protected speech is extraordinarily vague; that labor-management relations is an area in which prejudice may be expected; that a prosecution for employer speech works an impermissible chill on the First

> Amendment rights of employers; and that the broad range of traditional civil remedies available under the Railway Labor Act represents an effective and less drastic means of securing freedom from threats by an employer.

We submit that, given these undisputed facts, the First Amendment requires that no employer be prosecuted for speaking too forcefully to his employees in an effort to persuade them to vote against a union, and that these conspiracy convictions be reversed.

The Government does dispute that defendants' speeches were constitutionally protected. It must strain, however, to put a threatening gloss on Winston's October 5 and October 19 speeches. Three out-of-context snippets from the October 5 speech are said to constitute threats. However, the Government makes no attempt to justify that characterization by reference to the case law, or to rebut the demonstration in our main brief, pages 50-52, that these statements were legitimate argument protected by the First Amendment. One side of Hummel's contradictory testimony is cited to support the notion that the October 19 speech was threatening.*

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* The Government also relies on the testimony of Captain Donald Reeve concerning Winston's October 19 speech. Reeve testified on direct examination as follows (1364, emphasis added):

> "My impression is, if the union were to come in, be voted in or if he is going to have to negotiate with the union and it became cost prohibitive for him to operate to the full extent, that he may have to cut back operations, possibly deletions of some of the

(footnote cont'd.)

We contend that Winston's October 5 speech is constitutionally protected as a matter of law, and that there was insufficient evidence that the October 19 speech was other than constitutionally protected. If that is correct, the conspiracy convictions should be reversed.

The Government disagrees. It argues that Winston's speeches were not necessary to the jury's verdict (Gov. Br. 59-63). The Government, however, took a very different position below: the prosecutor urged the jury in his summation to find that Winston's October 5 and October 19 speeches each was threatening and to convict on that basis (1953-58, 2095). Having so argued to the jury, it is the Government which is

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routes, and if it came to the point where he felt that he could not make a profit or continue in business, that he would stop or cease operations."

On cross-examination, the examiner tried to clarify whether, according to Reeve, Winston had tied his options to the election (a threat) or whether the options would apply only if the union, having won the election, then bargained for a Golden West-type contract (protected speech) (1368). But all Reeve could say was: "As far as I am concerned, it is a matter of semantics."

In N.L.R.B. v. General Stencils, Inc., 438 F.2d 894, 900 (2d Cir. 1971), Judge Friendly observed that "it would defy reality to insist that a man in overalls, working on the plant floor, should precisely adhere to the niceties of expression that would be used by a careful lawyer trained in labor relations law." Reeve's testimony suggests that it is just as unreal -- and constitutionally impermissible -- to ground a conviction on the recollection of pilot Hummel eighteen months after the fact, concerning just such a distinction, and especially in light of the inconsistency of his testimony on the point.

estopped -- from contending on appeal that its argument had no impact on the jury's verdict.

Furthermore, in advancing this harmless error theory, the Government necessarily must rely on the closely disputed evidence that Bell's October 5 speech to the captains went beyond what is captured on tape (compare 1054-56, 1265-66, 1285, 1359-60, 1365, 1375 with 384, 477-78, 751, 798). In short, this case illustrates the wisdom of, and is governed by, Stromberg v. California, 283 U.S. 359 (1931) (main brief, page 56, note): Because it cannot be said with any degree of certainty that the jury did not convict the defendants of conspiring to tell the pilots only what defendants had a constitutional right to tell them, the conspiracy convictions should be reversed.

IV

THE CONVICTIONS ON THE SUBSTANTIVE COUNTS SHOULD BE REVERSED BECAUSE THE JURY MAY HAVE INFERRED GUILT FROM CONSTITUTIONALLY PROTECTED SPEECH

We agree with the Government that a jury normally is entitled to consider surrounding circumstances, including statements by a defendant, in evaluating a defendant's intent.

But the statements in question are of a special class; in our view, they constitute constitutionally protected argument. Moreover, both a statute, 29 U.S.C. § 158(c), and

the First Amendment prohibit a jury from being told (a) that they may consider such protected employer speech as illegal threats and (b) that they may evaluate whether a discharge was lawful or not in light of such 'illegal threats.'

If any of the speech proven below is constitutionally protected, the substantive counts should be reversed.

V

A VIOLATION OF SECTION 152(3), WHICH PROHIBITS COERCION OF EMPLOYEES' "CHOICE OF REPRESENTATIVES", MAY NOT BE BASED ON POST-ELECTION WRONGDOING

The Government cites three cases in support of its position that an employer may be convicted for "influencing" or "coercing" his employees' vote by discharging an employee long after their votes have been cast and counted and their representative designated.

Two of those cases, Texas N.O.R.R. Co. v. Brotherhood of Ry. Clerks, 281 U.S. 548 (1930), and Myers v. Louisiana & A. Ry. Co., 7 F. Supp. 92 (W.D. La. 1933), were decided prior to the 1934 amendments to the Railway Labor Act. At that time, the Act contained only the following language: "Representatives . . . shall be designated . . . without interference, influence or coercion." There was no section comparable to the current subsection 152(4), which specifically deals with post-election wrongdoing. The broad reading given to subsection 152(3)'s predecessor provision in these two cases was no

longer required after the enactment of subsection 152(4); it is not a proper basis upon which to ground interpretation of the current subsection 152(3). Indeed, if the current subsection 152(3) has the broad reach suggested by these earlier cases, what is the purpose of subsection 152(4)?

In the third case, Brotherhood of R.R. Trainmen v. Central of Georgia Ry. Co., 305 F.2d 605 (5th Cir. 1962), the complaint alleged that the employer intended wrongfully to discharge the employees' designated representative "and thereby to disqualify him as a representative of employees at investigations . . . and hamper and impede [him] in the performance of [his] duties as craft representative . . ." 305 F.2d at 607. Such action comes within the scope of subsection 152(3) because, as the Court of Appeals stated, the purpose and effect "is to discredit him . . . as bargaining representative." 305 F.2d at 608.

In any event, it is not necessary in civil cases to make nice distinctions between subsections 152(3) and 152(4). If conduct is violative of either provision, the predicate for relief is satisfied; there is no distinction in remedy between one violation and two.*

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* For this reason, the Government's reliance upon general statements concerning the scope of the Railway Labor Act (or the National Labor Relations Act) (Gov. Br. 79-81) is unjustified. Of course, discharge of an employee in retaliation for his vote violates the Act -- but only subsection 152(4).

But here the Government wants to obtain, for each of the allegedly wrongful discharges, two separate convictions -- one for the violation of each subsection. This criminal charge brings the question of law into sharp focus.

We submit that the only construction of the statute which accords with the plain meaning of its language, and with the Fifth Amendment,* is that an employer may be convicted for the post-election discharge of a union member only under subsection 152(4).

VI

COMMUTER AIRLINES, INC. AND BROOME COUNTY AVIATION, INC. MAY NOT BOTH BE CONVICTED

We argued in our main brief that the only competent evidence in the record on this issue -- the Company's financial statements -- showed that there was only one employer here, Broome.

The Government responds by offering testimony in which the pilots said that they worked for Broome and Commuter,** and by pointing to the requests for ballots. In those requests, the pilots identified themselves in various ways (Gov. Ex. 11b):

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* The Government does not show how its interpretation of subsection 152(3) -- under which defendants would twice be convicted for each of the discharges -- is consistent with the guarantee against double jeopardy.

** They were asked: "[W]ere you employed by Commuter Airlines and Broome County Aviation at any time?" (e.g., 183), or "Were you employed by the Defendant, Broome County Aviation, and Commuter Airlines, Inc." (e.g., 355, 530). They answered "Yes."

-- as employees of Commuter;

-- as employees of Broome;

-- as employees of "Commuter or Broome";

-- as employees of "Broome (Commuter)."*

Such declarations by pilots go very little toward proving the legal reality here at issue. For example, Sholl affirmed at trial that, yes, he worked for "Defendant, Broome County Aviation, and Commuter Airlines, Inc." (355), and he stated in his request for a ballot that he worked for "Broome County Aviation (Commuter Airlines)." In so doing, Sholl (and the others) plainly was using informal nomenclature -- much as we have referred in our briefs to the two entities as "the Company." The uncertainty is understandable: "Commuter Airlines" is the name written on the airplanes and on the aircrew uniforms. But trade names do not determine what entity is an "employer" for purposes of criminal liability.

In light of the record as a whole on this question, as set forth in our main brief, the unfocused assertions upon which the Government now relies are insufficient to support separate convictions against Commuter and Broome.

VII

COUNTS 2 AND 3 CHARGED AS ILLEGAL THE SAME CONDUCT CHARGED IN COUNTS 10 AND 11, THEREBY VIOLATING DEFENDANTS' GUARANTEE AGAINST DOUBLE JEOPARDY

The Government's proffered distinction -- between interfering with organizational activity and interfering with

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* When the Government says that "[o]n all but one of those documents, the employee stated that he was an employee of Commuter," (Gov. Br. 83), its count includes requests marked employee of Commuter or Broome, as well as requests marked employee of Broome (Commuter).

an election for a representative -- does not pass constitutional muster.

In exercising the right to choose a representative one necessarily is, by that very act, also exercising the right to organize. One is a subset of the other.

Because the convictions on counts 2 and 3 "necessarily embraced" -- Morgan v. United States, 294 Fed. 82 (4th Cir. 1923) (holding that a defendant may not be convicted for manufacturing illegal liquor, on the one hand, and for possessing distillery apparatus on the other) -- the convictions on counts 10 and 11, those convictions violated defendants' guarantee against double jeopardy.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in our main brief, the judgments of conviction against Jerry Winston, Theodore Bell, Broome County Aviation, Inc. and Commuter Airlines, Inc. should be reversed and the indictment dismissed.

Dated: New York, New York
April 1, 1977

Respectfully submitted,

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Of Counsel:

Jay Topkis
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M. Tracy Sillerman

PILOT TURNOVER*

	Terminations	Hirings
March, 1974 through August 15, 1974		Captain Pusztai Captain Baan Co-pilot Slough Co-pilot Sholl Co-pilot Larimore Co-pilot Hummel Co-pilot De Laurentis Co-pilot Fairchild Co-pilot Lewis Co-pilot McDougald Co-pilot Ton Co-pilot Ore
October, 1974	Captain Bann (discharged) Co-pilot Slough (discharged) Co-pilot Josephson (discharged) Co-pilot Ore (resigned)	
November, 1974	Captain Ferber Co-pilot McKinley (both left to keep flying for IBM)	
December, 1974	Captain Lamos (discharged) Co-pilot Sholl (discharged)	Captain Greenall, to replace Lamos (1194)
January, 1975	Captain Excell (retired) Co-pilot Williams (discharged)	
February, 1975	Co-pilot Larimore (discharged) Co-pilot Hummel (discharged)	Captain Potterbin, to replace Excell (1924) Captain Melich, to replace Floto (who was scheduled to leave in April) (1922)
March, 1975	Co-pilot De Laurentis (resigned)	Co-pilot Moretti, to replace De Laurentis (1924)

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* This chart was constructed from Government Exhibit 40 (40e), and from the testimony which appears in the parentheses. As to personnel activity in the summer, 1975, see pages 1925-26, which demonstrate that those few hirings also were necessitated by pilot resignations.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

UNITED STATES OF AMERICA, :

Plaintiff-Appellee, : Docket No. 76-1436

-against- :

JERRY WINSTON, BROOME COUNTY AVIATION, INC., COMMUTER AIRLINES INC., AND THEODORE (TED) BELL, : CERTIFICATE OF SERVICE

Defendants-Appellants. :

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MARVIN WEXLER, being sworn, states:

I am an attorney associated with PAUL, WEISS, RIFKIND, WHARTON & GARRISON, attorneys for appellants herein. On April 1, 1977 I served two copies of the annexed Reply Brief of the Defendants-Appellants on Paul V. French, Esq., United States Attorney for the Northern District of New York, Office of the United States Attorney for the Northern District of New York, United States Court House and Federal Building, 100 South Clinton Street, Syracuse, New York 13202, by depositing it in an envelope with postage pre-paid in a United States mail depository at 345 Park Avenue, New York, New York.

MARVIN WEXLER

Sworn to before me this
1st day of April, 1977.

Notary Public

FELIX ALIVENTI, JR.
Notary Public, State of New York
No. 31-5046500
Qualified in New York County
Commission Expires March 30, 1978